

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LOUIS A. KRUEGER,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-4253
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Krueger's application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 4). The court ordered Krueger to show cause why his petition should not be denied as time-barred (Dkt. 5). Krueger filed his response on January 18, 2008 (Dkt. 6). The court now recommends that Krueger's petition be denied with prejudice as time-barred.

Background

According to his petition, Krueger was convicted of aggravated sexual assault of a child on August 5, 2003 in the 177th District Court for Harris County, Texas and sentenced to life in prison. He alleges that the First Court of Appeals for Houston affirmed his conviction on an unknown date, and that the Texas Court of Criminal Appeals denied his application for writ of habeas corpus on October 15, 2003.

A review of Texas appellate court websites reveals that Krueger was in fact convicted in 1999; the First Court of Appeals confirmed his conviction in 2001; and the Texas court of criminal appeals denied his state application for writ of habeas corpus without written order on October 15, 2003. Krueger's petition is time-barred under either set of facts.

Analysis

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a petition for habeas relief filed by a person in state custody is subject to a one-year period of limitations which runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Even assuming that Krueger's federal statute of limitations was tolled through October 15, 2003, the date his state writ application was denied, his federal application is untimely. He did not file his federal petition until November 29, 2007.

The AEDPA's limitation period is not jurisdictional and is subject to equitable tolling in "rare and exceptional" circumstances. *Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). Equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from pursuing his rights." *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). The court examines each case on its facts to determine whether it presents "rare and extraordinary circumstances." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). In his show-cause response Krueger makes the conclusory statements that he does not read or write English and has been diagnosed as mentally retarded. Illiteracy is not a rare and exceptional circumstance that is grounds for equitable tolling of the limitations period. *Turner v. Johnson*, 177 F.3d 390, 391-92 (5th Cir. 1999). While the Fifth Circuit has recognized that mental incompetency might support equitable tolling under some circumstances, *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), Krueger has not met his burden to establish that his alleged mental incompetency rendered him unable to pursue his legal rights in this case.

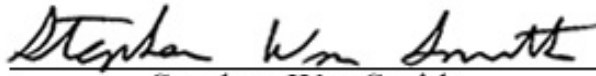
Conclusion

The court recommends that Krueger's petition be denied with prejudice as time-barred.

The court further finds that Krueger has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on February 5, 2008.



Stephen Wm Smith
United States Magistrate Judge